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No. 90-1665

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

KIDDER, PEABODY & CO. INCORPORATED,
Petitioner,

v.

MAXUS ENERGY CORPORATION and
MAXUS CORPORATE COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONER

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TABLE OF AUTHORITIES

Cases	Page
Aydin Corp. v. *Loral Corp.*, 718 F.2d 897 (9th Cir. 1983)	2
Bangor Punta Operations, Inc. v. *Bangor & Aroostock R.R.*, 417 U.S. 703 (1974)	7, 8, 9
Blau Plumbing v. *S.O.S. Fix-It*, 781 F.2d 604 (7th Cir. 1986)	4
Brown v. *Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977)	2
Carnegie-Mellon University v. *Cohill*, 484 U.S. 343 (1988)	3, 5, 6
Caserta v. *Village of Dickinson*, 672 F.2d 431 (5th Cir. 1982)	2
Danner v. *Himmelfarb*, 858 F.2d 515 (9th Cir. 1988)	4
Dezell v. *Day Island Yacht Club*, 796 F.2d 324 (9th Cir. 1986)	4
Graf v. *Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341 (7th Cir. 1986)	1, 3, 6
Grano v. *Barry*, 733 F.2d 164 (D.C. Cir. 1984)	2
In re Nucorp Energy Sec. Litig., 772 F.2d 1486 (9th Cir. 1985)	2
Ingram Corp. v. *J. Ray McDermott & Co.*, 698 F.2d 1295 (5th Cir. 1983)	2, 4
Jackson v. *Stinchcomb*, 635 F.2d 462 (5th Cir. 1981)	2
La Porte Constr. Co. v. *Bayshore Nat'l Bank*, 805 F.2d 1254 (5th Cir. 1986)	4
Laird v. *Board of Trustees*, 721 F.2d 529 (5th Cir. 1983)	4
Meyer v. *California & Hawaiian Sugar Co.*, 662 F.2d 637 (9th Cir. 1981)	2
Notrica v. *Board of Supervisors*, 925 F.2d 1211 (9th Cir. 1991)	4
Perry v. *Jones*, 506 F.2d 778 (5th Cir. 1975)	2
Ruiz v. *Estelle*, 679 F.2d 1115 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983)	4
Shaffer v. *Board of School Directors*, 730 F.2d 910 (3d Cir. 1984)	2
Tully v. *Mott Supermarkets*, 540 F.2d 187 (3d Cir. 1976)	2

TABLE OF AUTHORITIES—Continued

Page

United States v. *Zima*, 766 F.2d 1153 (7th Cir. 1985) 5

Weaver v. *Marine Bank*, 683 F.2d 744 (3d Cir. 1982) 2

Statutes

28 U.S.C. § 1407 10

Other Authorities

Report of the Judicial Conference Ad Hoc Comm. on Asbestos Litig. (March 1991) 10

REPLY BRIEF OF PETITIONER

The petition for certiorari demonstrated that there is a substantial conflict in the approaches taken by the courts of appeals in determining whether a district court should exercise pendent jurisdiction over state-law claims, with some circuits placing dispositive emphasis on concerns of judicial economy, convenience, and fairness, and others placing far greater weight on values of comity and federalism. In this case, the court of appeals staked out an extreme position in the second category, and the implications of its holding, and of this conflict generally, for the fair and efficient resolution of complex civil litigation are both significant and far-reaching.

In their brief in opposition, respondents Maxus Energy Corporation and Maxus Corporate Company ("Maxus") contend that no disagreement among the circuits actually exists, and argue that the Second Circuit's decision to require relitigation of Maxus' claims in Texas state court was correct. The circuit conflict on this issue, however, is plain and unmistakable, as even the cases cited by Maxus make clear. It is equally clear that the Second Circuit erred in requiring relitigation, and the only way Maxus can contend otherwise is by seriously mischaracterizing both the district court's holding and the underlying facts. Viewed correctly, the holding below will require scarce resources to be expended relitigating an issue that already has been fully, fairly and properly decided.

1. Maxus contends (Opp. 8, 14) that only an "archeologist" could "uncover" the circuit conflict posed by the holding below. But there is nothing hidden, ancient, or valuable in the split in the approaches taken by the courts of appeals, and it can readily be "uncovered" by a survey of the caselaw. In *Graf* v. *Elgin, Joliet & E. Ry. Co.*, 790 F.2d 1341, 1347-48 (7th Cir. 1986), the Seventh Circuit *held* that judicial economy was "the essential policy" underlying the "modern doctrine of pendent jurisdiction," and that this policy supported the exercise of pendent jurisdiction "in any case where substantial ju-

dicial resources have already been committed, so that sending the case back to another court will cause a substantial duplication of effort." The Fifth [1] and Ninth Circuits [2] take the same approach.

In this case, the Second Circuit took an entirely different view, holding that judicial economy "should not be the controlling factor," that it would be "appropriate for a court to relinquish jurisdiction over pendent claims even where the court has invested considerable time in their resolution." Indeed, by declaring that Judge Pollack had abused his discretion in deciding the state law issue, the Second Circuit adopted essentially a *per se* rule favoring comity. The Third and D.C. Circuits have taken a similar position.[3] These holdings are clearly stated, and the conflict concerning the proper management of complex litigation is indisputable.

Maxus nonetheless contends that these decisions reflect a consistent application of the same general standard. It supports this argument in two ways. *First*, Maxus quotes prefatory portions of the decisions in the Fifth, Seventh, and Ninth Circuits in which the courts

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[1] See, *e.g.*, *Caserta* v. *Village of Dickinson*, 672 F.2d 431, 433 (5th Cir. 1982) ("[p]rinciples of judicial economy, convenience, and fairness to the litigants suggest that a court should be reluctant to dismiss a pendent claim once substantial time and resources have been devoted to such claims and the court has heard the evidence and arguments on such issues"). See also *Ingram Corp* v. *J. Ray McDermott & Co.*, 698 F.2d 1295, 1319-20 (5th Cir. 1983); *Jackson* v. *Stinchcomb*, 635 F.2d 462, 472 n.20 (5th Cir. 1981); *Brown* v. *Knox*, 547 F.2d 900 (5th Cir.), *cert. denied*, 432 U.S. 906 (1977); *Perry* v. *Jones*, 506 F.2d 778 (5th Cir. 1975).

[2] See, *e.g.*, *Meyer* v. *California & Hawaiian Sugar Co.*, 662 F.2d 637, 640 (9th Cir. 1981) (pendent jurisdiction appropriately exercised "[w]here, as here, the court and the litigants had expended considerable time on the pendent claims"). See also *In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1491 (9th Cir. 1985); *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 904 (9th Cir. 1983).

[3] See *Shaffer* v. *Board of School Directors*, 730 F.2d 910, 912 (3d Cir. 1984); *Weaver* v. *Marine Bank*, 683 F.2d 744, 746 (3d Cir. 1982); *Tully* v. *Mott Supermarkets*, 540 F.2d 187, 196 (3d Cir. 1976); *Grano* v. *Barry*, 733 F.2d 164, 169 (D.C. Cir. 1984).

of appeals indicated that comity is one of the factors that district courts should generally consider (Opp. at 8-11), suggests that these circuits therefore employ the same balancing analysis as the other circuits, and concludes that any differences in the outcomes must accordingly be based merely on differences in the facts. But this Court has expressly held that lower courts should weigh "the values of judicial economy, convenience, fairness, and comity" in deciding whether to exercise pendent jurisdiction, *Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343, 350 (1988), and it is not surprising that the courts of appeals generally make reference to those values at the outset of their analyses. What this Court has never done is provide further guidance concerning how these factors relate to each other and whether any one factor, such as comity, should be given a preeminent or dispositive position in the process of weighing the relevant criteria. After parroting the *Carnegie-Mellon* factors, the courts explain what relative weight these factors should be given when they conflict, and in this case the Second Circuit confirmed its view that comity should trump all others whenever there is pending a parallel state court proceeding. That holding implicates a broad disagreement among the circuits, which Maxus simply ignores.[4]

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[4] For example, Maxus attempts to explain away *Graf* by quoting the Seventh Circuit as stating that "in this and other circuits," "when the federal claims drop out before trial any pendent state law claims should be dismissed." Opp. at 10. That statement, however, immediately precedes the court's explanation that this principle *does not apply*—even after the federal claims have been dismissed—when the exercise of pendent jurisdiction would promote judicial economy. *Graf*, 790 F.2d at 1345-46. It was on this basis that the *Graf* court *approved* the exercise of pendent jurisdiction. Similarly, Maxus notes that the Court in *Ingram* spoke of the need to reconcile considerations of comity with those of judicial economy, convenience, and fairness. Opp. at 9. Immediately following that statement, however, the Fifth Circuit explained that these were "oft-times divergent goals," concluded that judicial economy, convenience, and fairness were "the hallmarks of the pendent

Second, Maxus cites several other cases in the Fifth, Seventh and Ninth Circuits in which the courts of appeals have held that it was appropriate to *decline* to exercise pendent jurisdiction, and suggests that this undermines any claim of a circuit conflict. Opp. at 9-11. But the conflict is not over whether pendent jurisdiction should always be exercised or always be declined—obviously, each circuit will generate cases with varying outcomes based on their facts. The division of authority concerns the *basis* for deciding whether pendent jurisdiction should be exercised. In most of the cases cited by Maxus, the courts of appeals approved the dismissal of pendent claims only after concluding either that judicial economy would simply not be affected by dismissal,[5] or that judicial economy would be affirmatively promoted by dismissal.[6] Far from disproving the conflict, the cases cited by Maxus confirm it.[7]

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jurisdiction doctrine," and went on to exercise pendent jurisdiction for that reason. *Ingram*, 698 F.2d at 1319-1320.

[5] See, *e.g.*, *La Porte Constr. Co.* v. *Bayshore Nat'l Bank*, 805 F.2d 1254, 1257 (5th Cir. 1986) ("[j]udicial economy does not argue for the exercise of pendent jurisdiction in this case. Because the trial court dismissed the case at such an early stage, there is no commitment of federal judicial resources"); *Laird* v. *Board of Trustees*, 721 F.2d 529, 535 (5th Cir. 1983) ("judicial economy or convenience would have been little served by the district court's adjudication of the issues"); *Blau Plumbing* v. *S.O.S. Fix-It*, 781 F.2d 604, 612 (7th Cir. 1986) ("economy is missing . . . in this case" and "[n]o other reason [for exercising pendent jurisdiction] has been suggested"); *Danner* v. *Himmelbarb*, 858 F.2d 515, 524 (9th Cir. 1988) (court has discretion to retain pendent jurisdiction over state law claims "if considerations of judicial economy and fairness so dictate").

[6] See, *e.g.*, *Notrica* v. *Board of Supervisors*, 925 F.2d 1211, 1215 (9th Cir. 1991) (by dismissing pendent claims in this case "we promote the values of judicial economy and convenience that underlie the doctrine of pendent jurisdiction"); *Dezell* v. *Day Island Yacht Club*, 796 F.2d 324, 329 (9th Cir. 1986) ("[w]e conclude that the 'considerations of judicial economy, convenience, and fairness' weigh heavily against the exercise of pendent jurisdiction").

[7] The two other cases cited by Maxus are simply irrelevant. The court in *Ruiz* v. *Estelle*, 679 F.2d 1115, 1158-59 (5th Cir.

Perhaps most telling is that Maxus, although it strenuously contends that each of these courts is applying the same standard, never describes what that standard actually is. The closest it comes is its repeated invocation (Opp. at 8, 13-14) of the statement in *Carnegie-Mellon* that "a federal court should consider and weigh *in each case*, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction" over pendent state law claims. 484 U.S. at 350 (emphasis added by Maxus). But merely identifying the relevant factors does not resolve how those factors should be applied. Whether comity or judicial economy is to be the most important factor in that analysis is a matter that should be decided by this Court and not left to the divergent opinions in the lower courts.

2. The remainder of Maxus' opposition (Opp. at 14-19) defends the decision below on the merits. Even if the decision below were correct, the circuit conflict would warrant a grant of certiorari. The decision is, however, severely flawed. In holding that the mere pendency of a parallel state court proceeding will require the relitigation of complex claims, notwithstanding the substantial federal judicial resources already invested in their resolution, the court of appeals clearly did violence to the abuse of discretion standard of review.

a. The court of appeals concluded that principles of comity required the parties to relitigate the standing/injury issue before the Texas court because the Texas litigation was "almost at the discovery stage," and because the issue was one which "the Texas court could capably and competently decide." Pet. App. 14a-15a. As explained in Kidder's petition, it reached this conclusion

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1982), *cert. denied*, 460 U.S. 1042 (1983), reversed the district court's decision to exercise pendent jurisdiction because the plaintiff had never even asserted any state law claims, and in *United States* v. *Zima*, 766 F.2d 1153, 1160 (7th Cir. 1985), the court expressly declined to reach the question of whether pendent jurisdiction had properly been exercised.

despite the fact that the Texas court would be asked to apply Delaware law, not Texas law. This was an extraordinarily thin basis for asserting that considerations of comity should be given decisive weight, and Maxus' effort to defend the court's comity analysis does not withstand serious scrutiny.

First, Maxus asserts (Opp. at 15) that the Texas proceedings were "significantly advanced," and states that "the case had involved several pre-trial motions and forty depositions." This is wrong. At the time the district court issued its Order (Pet. App. 19a-24a), only *two* depositions had been taken—which is why the court of appeals stated that the case was "almost" at the discovery stage. The only pre-trial motion that had been filed was Kidder's motion, which it later renewed (hence the plural "motions"), to stay the proceedings pending resolution of the multidistrict action.

Second, Maxus argues (Opp. at 15) that, in reversing the district court for abusing its discretion, the court of appeals was "merely paying heed" to this Court's holding in *Carnegie-Mellon* that, where federal claims are dismissed before trial, state claims should be dismissed as well. 484 U.S. at 350 n.7. If that is in fact the basis for the opinion below, then the circuit conflict could not be clearer. It is precisely this principle—that "when the federal claims drop out before trial any pendent state law claims should be dismissed"—that the Seventh Circuit held should not apply where "substantial judicial resources have already been committed." *Graf*, 790 F.2d at 1347. The Seventh Circuit explained:

> Trial is simply a convenient benchmark marking the point by which substantial resources have surely been committed. If those resources are expended without a trial, the essential purpose of the doctrine of pendent jurisdiction may be served by retaining the case.

Id. at 1348. In light of the thousands of pages of submissions to Judge Pollack on this issue and the seven hearings he held, there can be no doubt that "substantial

judicial resources [had] already been committed." Nonetheless, the Second Circuit found those undertakings an insufficient basis for the district court's exercise of its discretion. It is clear that the Seventh Circuit would have resolved this case differently.

Third, Maxus asserts (Opp. 17) that, while the standing issue may well have been controlled by Delaware law, there were other issues resolved by the district court that would have been governed by Texas law. This flies in the face of the uniform understanding of both parties and the Texas court as expressed throughout this litigation. The issue under *Bangor Punta Operations, Inc.* v. *Bangor & Aroostock R.R.*, 417 U.S. 703 (1974), was whether Maxus could assert a claim to recover damages for the allegedly inflated merger exchange ratio negotiated in the Natomas transaction, and that was the basis of the district court's declaratory judgment. That issue was controlling, because if Maxus did not have standing to assert its claim, the other legal issues were irrelevant. Both parties, as well as the Texas court, initially asked the Delaware court to resolve that issue precisely because it was an issue of Delaware law,[8] and the Texas court plainly was no more competent to decide this issue than the federal district court in New York.

b. At the same time that it seeks to buttress the Second Circuit's excessive reliance on comity concerns, Maxus trivializes the substantial considerations of judicial economy that were implicated by this two-track liti-

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[8] When Kidder first moved to stay the Texas action, the Texas court suggested that, because the threshold question of standing was governed by Delaware law, that question could best be addressed by the Delaware court. C.A. App. 292. See also Motion of Maxus Energy Corporation for Partial Summary Judgment before the Delaware Court of Chancery (C.A. App. 600) (moving "for summary judgment in its favor determining that Diamond Shamrock Corporate Company has the right to assert claims against Kidder, Peabody & Co. Incorporated ('Kidder') for damages arising out of the acquisition of Natomas Company").

gation. Maxus repeatedly suggests (Opp. at 4-5, 6, 14 n.6, 16-17) that there was no need for the district court to reach the *Bangor Punta* issue at all in order to dispose of the federal claims, because Maxus had already represented that it would not bring such claims. The district court, however, found those representations unreliable, and that is why it proceeded to resolve the issue on substantive grounds.[9] The court of appeals agreed that, despite these unilateral representations, a "live controversy existed at all times." Pet. App. 10a. The federal issues were resolved on the basis of *Bangor Punta*, and once the district court had resolved those issues on grounds equally dispositive of state law claims,

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[9] The district court made this clear in its Order:

> Maxus . . . has unequivocally avowed in its representations and concessions in this Court that it has no legal claims and will not assert any legal claims under Sections 10(b) and 14(e) of the Securities Exchange Act of 1934 against the plaintiff and that it forgoes and has no intent or desire to again assert or litigate in Texas or elsewhere any federal claims against Kidder by reason of events leading up to and including the merger and the distribution of equity stock in the merged enterprise. It is noted nonetheless, in apparent contradiction of its declarations for the motions herein, that the first amended original petition of Maxus Corporate in Texas does incorporate significant assertions relevant to a federal securities claim. *The exchange ratios of the negotiated, stock for stock, distribution in the merger of Natomas and (Old) Diamond Shamrock are not subject to retroactive adjustment by Diamond Shamrock for or by its former stockholders, and certainly not by the later-created Maxus, which suffered no cognizable injury during the Natomas transactions. See Bangor Punta . . .*
>
> Under the circumstances, a declaration here on Kidder's claim is appropriate and is granted to lay at rest the key questions raised in this case.

Pet. App. at 20a-21a (emphasis added) (footnote omitted). Thus, Judge Pollack first found that the federal claims were not moot; then ruled that Maxus may not, under *Bangor Punta*, bring claims based on the merger exchange ratio allegedly inflated by Boesky's insider trading; and only then concluded that Kidder was entitled to a declaration of non-liability.

it correctly refused to permit the parties to relitigate them in Texas.

These considerations of judicial economy were significantly strengthened by the overlap between the Texas state court action and the multidistrict litigation over which Judge Pollack was presiding. Contrary to Maxus' assertions (Opp. at 18), the overlap was substantial and pervasive. At the time that Kidder filed its declaratory judgment action, six of the transactions at issue in the multidistrict proceeding, which then represented one-third of all the transactions in that proceeding, including the Natomas transaction, were premised on the same alleged Siegel-Boesky insider trading conspiracy that is at the heart of Maxus' claim. The remainder of the multidistrict action involved aspects of Boesky's operations common to all of the claims. Maxus also misses the point in suggesting (Opp. at 18) that the claims in the multidistrict proceeding, including Kidder's action, did not require resolution of state law issues common to the multidistrict cases and Maxus' claims. Both the multidistrict proceeding and Maxus' claims were premised on precisely the same core issues—whether Siegel had provided insider information to Boesky, whether Boesky had traded on that information, and whether Kidder could be held liable for Siegel's actions.

3. In short, Judge Pollack properly decided an issue which was dispositive of both the federal and the related state law claims before him, and therefore properly precluded the parties from pursuing those claims a second time elsewhere. Judge Pollack, moreover, declined to exercise pendent jurisdiction over those state-law claims before him as to which the fully-briefed and heard *Bangor Punta* arguments were not dispositive, notably Maxus' claim for return of Kidder's fee. Thus, Maxus' assertion (Opp. at 16) that Judge Pollack failed to give comity concerns any weight at all is plainly incorrect. He foreclosed only the relitigation of the issues he had already decided after substantial effort by the parties and sig-

nificant investment of judicial resources, while leaving undisturbed the remainder of Maxus' state-law claims. This course of action was designed to achieve the prompt and efficient resolution of the claims already fully litigated in federal court, while leaving the truly separate issues to be resolved by the Texas court. Far from encouraging piecemeal litigation (Opp. at 19), this was the procedure best suited to adjudicating each set of claims in a consistent and unified manner.

The impact of the decision below goes well beyond this particular case. If the parties to complex civil proceedings can maintain separate and overlapping lawsuits on the basis of the legal standard applied by the Second Circuit, then the courts will have lost a valuable mechanism for managing and streamlining consolidated litigation. The result will be precisely the sort of splintered litigation that Congress sought to avoid when it adopted the multidistrict litigation statute, 28 U.S.C. § 1407. Moreover, the resources used to relitigate unmeritorious claims in state court that have been fairly and fully adjudicated in federal court will only serve to reduce the amount of money that other plaintiffs with meritorious claims will be able to recover. In a system where less than 40 cents [10] out of every dollar spent in complex litigation actually goes to injured plaintiffs, a holding that increases inefficiency and waste is a matter of grave significance that warrants review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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[10] Report of the Judicial Conference Ad Hoc Comm. on Asbestos Litig. 13 (March 1991).

Respectfully submitted,

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